IN THE

Supreme Court of the United States

October Term, 1958

No. 397

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE M. DAY, Administrator ad Litem of the Estate of Charles A. DePriest,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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INDEX

Table of Cases

Other Authorities

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Petitioner in its brief asserts three reasons why it conceives that a writ of certiorari should issue from this court in conformity with the prayer of its petition. They are:

1. The decision of the court below is in conflict with principles established by the decisions of this court.

2. The judgment of the court below throws the railway industry into confusion in the administration of the Railway Labor Act.

3. The judgment of the court below is alleged to be in conflict with principles upheld in the decisions of the Courts of Appeals for the Fifth, Seventh and Tenth Circuits.

1.

The Judgment of the Court of Appeals for the Third Circuit Sought To Be Reviewed Is Not In Conflict With the Principles Established By the Decisions of This Court.

The petitioner argues that the judgment of the United States Court of Appeals for the Third Circuit which it seeks to review is in conflict with the principles established by the decisions of this court in *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, 353 U. S. 30, 77 S. Ct. 635 (1957), *State of California* v. *Taylor*, 353 U. S. 553, 77 S. Ct. 1037 (1957) and *Order of Railway Conductors* v. *Southern Railway Co.*, 339 U. S. 255, 70 S. Ct. 585 (1950). In this contention it is clearly mistaken.

In *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, 353 U. S. 30, 77 S. Ct. 635, this court decided that when a "minor dispute" or grievance exists between a union of railroadmen which is the collective bargaining agent of those men and the employer with which the collective bargaining agent is authorized to deal, each party under the Railway Labor Act has the right to submit the grievance to the National Railroad Adjustment Board and that when the carrier elects to submit its dispute to the National Railroad Adjustment Board, the union can not defeat the jurisdiction of the Board by causing a strike.

In *State of California* v. *Taylor*, 353 U. S. 553, 77 S. Ct. 1037, this court decided that the National Railroad Adjustment Board had jurisdiction over grievances between a state-owned railroad engaging in interstate commerce and its employees. As a corollary it held that state sovereignty did not exempt a state owned railroad company engaging in interstate commerce from the jurisdiction vested in the

National Railroad Adjustment Board by the Federal Railway Labor Act.

In *Order of Railway Conductors* v. *Southern Railway Co.*, 339 U. S. 255, 70 S. Ct. 585, the same question was present as was raised and decided in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950). This court held in that case that a state court had no jurisdiction to determine by declaratory judgment a dispute arising between a railroad company and the collective bargaining agent of its employees which grew out of the collective bargaining agreement but that the jurisdiction over such a dispute was in the National Railroad Adjustment Board.

The decision sought to be reviewed is clearly distinguishable from these cases.

In *Order of Railway Conductors* v. *Southern Railway Co.*, *supra*, and *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, *supra*, the dispute existed between a railroad company and a collective bargaining agent for its employees. In *State of California* v. *Taylor*, *supra*, a dispute existed between a state owned railroad company engaged in interstate commerce and the employees of that railroad. All of these disputes were clearly within the grant of jurisdiction to the National Railroad Adjustment Board by the Federal Railway Labor Act. Section 3 first of the Act (45 U. S. C. A. 153 first) after establishing the Board and providing for the selection of its membership in sub-section (g) divided the Board into four divisions, independent of each other, and prescribed the jurisdiction of each division. The Act prescribed that the First Division was "To have jurisdiction over disputes involving train and yard service employees and carriers: that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard service employees." This First Division, therefore, had jurisdiction over carriers on the one hand and generally speaking its employees who were members of train and engine crews on the other.

Congress also in Section 1 of the Act (45 U. S. C. A. 151 fifth) defined employees as follows:

> "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner and rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission."

One other provision of the Railway Labor Act is material at this juncture. Section 3 first i provides as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the adjustment board with a full statement of the facts and all supporting data bearing upon the disputes."

In this case the complaint had been filed by Charles A. DePriest who was a pensioner of the Pennsylvania Railroad Company. Pending the first appeal to the United States Court of Appeals for the Third Circuit, Mr. DePriest

died and his administrator, the present plaintiff, George M. Day, was substituted as the party plaintiff. Both Mr. DePriest and Mr. Day were residents of the State of New Jersey. The defendant is a corporation of the Commonwealth of Pennsylvania and the requisite jurisdictional amount is in controversy. Therefore all of the diversity elements are present in this case. However, at the time the complaint was filed Mr. DePriest himself was not an employee of the petitioner as gauged by the statutory standard. He was no longer in the service of the carrier, he was no longer subject to its continuing authority to supervise and direct the manner and rendition of his service and he performed no work for the petitioner. In every one of the three particulars named by the Act, Mr. DePriest failed to qualify as an employee. Mr. Day in his capacity as Administrator *ad litem* of Mr. DePriest's estate also wholly fails to meet the standards of the Act. He is an officer appointed by the Superior Court of New Jersey to liquidate the assets of Mr. DePriest's estate, which this suit represents. Therefore, since DePriest was not an employee and Day is not an employee of the petitioner, they do not come within the relationship of carrier and employee which the Act makes a requisite to the jurisdiction of the National Railroad Adjustment Board, First Division.

On the contrary, in *State of California* v. *Taylor*, concededly the dispute was between a state owned railroad company and its employees. In *Order of Railway Conductors* v. *Southern Railway* and in *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana Railroad Company*, the dispute was between carriers on the one hand and groups of employees on the other. These three cases upon which the petitioner relies presents the relationship which Congress said must exist in order that the Board might have jurisdiction while the case under review with either the original plaintiff or the present plaintiff being considered does not present such a relationship.

Herein then is the vital difference between the two classes of cases.

The judgment below was fully supported by the holdings and rationale of *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630, 61 S. Ct. 554, 85 L. ed. 1089 (1941). In that case this court held that the Federal Railway Labor Act does not deprive the courts of jurisdiction to determine a controversy over a wrongful discharge or make an administrative finding a prerequisite to filing a suit in court.

In 1946 this court decided *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322. In that case the Order of Railway Conductors and Brotherhood of Railroad Trainmen had a dispute as to which craft should do certain work for the trustee of a railroad subject to the bankruptcy jurisdiction of the United States District Court. The Order of Railway Conductors brought this action in the reorganization court for the purpose of having the trustee direct it to apply the collective bargaining agreement in the manner desired by it. This court held that while the District Court had supervisory power to instruct its trustees with respect to their application of the collective bargaining agreement but that it had no jurisdiction to make a judgment or order that adjudicated the dispute in a manner binding on the National Railroad Adjustment Board.

Three years later and nine years after its decision in *Moore* v. *Illinois Central*, *supra*, this court held in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 329, 70 S. Ct. 577 (1950), that a state court had no jurisdiction to render a declaratory judgment construing a collective bargaining agreement as to which a railroad and two collective bargaining agents were in dispute, but that the jurisdiction over such a controversy raised in the National Railroad Adjustment Board.

This court was very careful in the *Slocum* case to point out in two instances that the *Moore* case on the one hand and cases of the class of *Order of Railway Conductors* v. *Pitney* and *Slocum* v. *Delaware, L. & W. R. Co.*, were not inconsistent. At page 244 of 339 U. S. and page 580 of 70 S. Ct., this court said:

> "Our holding here is not inconsistent with our holdin Moore v. Illinois Central Railroad Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. ed. 1089. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provisions of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

And again:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the Moore case does not conflict with this decision, and no contrary inference should be drawn from any language in the Moore opinion. * * *."

In the immediate foregoing quotations in addition to emphasizing that there is a distinction between the line of cases headed by *Moore* v. *Illinois Central* and those in the line headed by *Order of Railway Conductors* v. *Pitney*, this court was careful to show that a discharged employee had his choice of remedies. He could continue to assert his employee status and apply to the Board for reinstate-

ment, in which case the relationship of carrier and employee, prescribed by the statute, would exist. On the contrary, if he chose to accept his discharge as final, as Moore did, he thereby ceased to be an employee and the common law courts could then provide him his remedy, the Board no longer having jurisdiction. The court below recognized this very distinction in that paragraph of its opinion which is the last paragraph on page 25 as it appears in Appendix B of the petitioner's petition herein. There the court called attention to the statutory definition of the term "employee" and of the grant of jurisdiction to the Board in Section 3 first i. Immediately thereafter the court below discussed the *Moore* case and the *Slocum* case and expressly quoted the above quoted language from this court's opinion in *Slocum*, which showed the distinction in the two lines of cases.

In *Transcontinental and Western Air* v. *Koppl*, 345 U. S. 653, 660, 73 S. Ct. 906, 910 (1953), this court again quoted from and distinguished between the *Moore* case and the *Slocum* case.

The court below did no more in this case than this court itself did for at least the twelve years immediately following the decision in the *Moore* case.

Is there any significance in the fact that in the *Moore* case the plaintiff was a discharged employee, and in the present case that the plaintiff's decedent was a pensioner and that the present plaintiff is his administrator? A discharged employee has the employment relationship terminated by the unilateral action of the employer. A pensioned employee severs the employment relationship because the collective bargaining agreement permits him to do so. In both instances the employment relationship ceases to exist. The only difference is the manner in which the termination of the relationship is brought about. Measured by the statutory standard contained in Section 1 fifth, neither a discharged employee or a pensioner is in the

service of the carrier; neither is he subject to its continuing authority; the employer no longer has the right to supervise and direct the manner and rendition of their service; and they perform no work for the carrier. The situations are exactly parallel and there is no valid distinction between the two.

The decision of the lower court therefore does not depart from or violate the decision or principles established by this court but on the contrary clearly adheres to them.

2.

The Decision of the Court Below Does Not Throw Into Confusion the Administration of the Statute By Both Carriers In the Industry and Their Employees.

We think we have demonstrated under Point No. 1 that the lower court recognized and applied a distinction between two lines of cases that this court itself established and has several times reiterated. It is hardly a valid reason for the granting of a writ of certiorari that the law as applied by the courts results in confusion. If any confusion exists it exists because the carrier refuses to recognize the law as this court has declared it to be and refuses to apply the principles which this court has laid down. The railroad industry and railway labor has had the benefit of this court's decisions in *Moore, Order of Railway Conductors* v. *Pitney, Slocum* v. *Delaware, L. & W. R. Co.*, and kindred cases for many years. It can hardly be said that the industry has not had fully ample time and a sufficient number of careful declarations from this court to understand the principles which these cases established.

In the consideration of this matter one of the very early cases involving the Federal Railway Labor Act to be decided by this court should not be overlooked—*Elgin*,

E. Ry. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, J. L. ed. 1886 (1945), re-hearing denied and former 8 ision adhered to in 327 U. S. 661, 66 S. Ct. 721 (1946). d at case originated in the United States District Court T the Northern District of Illinois. It was a suit by f rley and other employees of the petitioner to recover l mages for an alleged violation of their employment a reement. The defendant moved for a summary judg- nt in the District Court. This court noted at page 712 n its opinion that the District Court rendered the summary of dgment for the defendant, "holding that the Board's ju ard was a final adjudication of the claims, within the a ion's power to seek and the Board's to make, preclud- u g judicial review." The District Court, therefore, had h eld that the plaintiffs were already concluded by an a djudication by the National Railroad Adjustment Board, a e union having taken the claim to the Board. This t ourt further noted that the Court of Appeals for the S eventh Circuit in 140 F. 2d 488, 490, had reversed the S dgment of the District Court, "holding that the record j resented a question of fact whether the union had been a uthorized by respondents to negotiate, compromise, and s ettle the claims." The Court of Appeals therefore held t hat a question of fact existed which entitled the plaintiffs t o a trial of their suit for damages. This court affirmed t he judgment of the Court of Appeals but pointed out t hat the crucial question was not merely whether the p laintiffs had authorized the union to settle their claims b y agreement with the carrier and whether on the record t hat presented a question of fact but was whether or n ot the award of the National Railroad Adjustment Board w as validly made. This court therefore did in fact affirm t he right of an employee to sue for his wages under his c ontract of employment even while the relationship of e mployer and employee existed.

In *Ceparo v. Pan-American Airways*, 195 F. 2d 453 (1952), the Court of Appeals for the First Circuit affirmed

the right of an airline employee to sue in court for his wages stating at page 455 of its opinion that it saw no reason "why a suit to recover wages allegedly due under a collective bargaining agreement should stand on any different footing from the one to recover for discharge in violation of such a contract". This court declined to disturb this holding by a denial of certiorari, 344 U. S. 840 and by a denial of re-hearing, 344 U. S. 882.

We think it worthy of note at this juncture that a suit for wages is a common law action, one which was known at the time of the adoption of the Constitution of the United States and of Bill of Rights. We respectfuly submit that the petitioner's contention if supported by a judgment of this court would result in a denial to the respondent of his right to a trial by jury guaranteed to him by the Seventh Amendment and that that construction of the Railway Labor Act wihch accords to the respondent the important constitutional right to which he is clearly entitled should be preferred to one which denies him that right simply because the original claimant had been a railroad man.

3.

The Decision of the Court Below Is Not In Conflict With the Decisions of the Courts of Appeals for the Fifth, Seventh and Tenth Circuits.

The petitioner points to *Sigfred* v. *Pan-American Airways*, 230 F. 2d 13 (Fifth Cir. 1956) certiorari denied 351 U. S. 925, as being a decision of the United States Court of Appeals for the Fifth Circuit with which the decision of the court below is in conflict. The learned court below cited the *Sigfred* case and correctly distinguished the case

at hand from it on the basis that the *Sigfred* case presented an attempt by Sigfred to review a decision of the National Railroad Adjustment Board to which he had submitted his claim and the decision of which Board had been adverse to him. See page 29 of petitioner's petition. The *Sigfred* case decided that the employee had no right of review in the Federal Court of an adverse decision of the National Railroad Adjustment Board. The United States Court of Appeals for the Third Circuit decided the same proposition in harmony with the Fifth Circuit in *Barnett* v. *Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579 (1957), which it cited and distinguished in its opinion below (which discussion is to be found at page 30 of the Petitioner's petition).

Petitioner further points to *Buster* v. *Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 195 F. 2d 73 and *Walters* v. *Chicago and Northwestern Railway*, 216 F. 2d 332, as decisions of the United States Court of Appeals for the Seventh Circuit with which the judgment below is in conflict.

The Court of Appeals for the Seventh Circuit in the *Buster* case appears not to have expressly cited *Moore* v. *Illinois Central* decided by this court but a reading of its opinion clearly discloses that it applied the principles. At page 74 of its opinion it called attention to its former decision and to the decisions of this court which hold that the District Courts of the United States have no jurisdiction of an action to restore a discharged railway employee to his position or to award him back wages. That was wholly consistent with the *Moore* case and the *Slocum* case which held that the discharged employee could make an election of his remedies, that if he desired reinstatement his remedy lay at the Board but that if he accepted his discharge as final, thereby putting beyond question the non-existence of the employer-employee relationship, he could sue in a

common law action for damages for his wrongful discharge. *Buster* had apparently attempted to assert both remedies and the Court of Appeals held that as to the discharge and the right to recover back wages due him because of his discharge the courts had no jurisdiction. The court, however, was careful to point out that diversity of citizenship existed and that the court below did have jurisdiction to entertain his action for the recovery of damages for his alleged wrongful discharge. The Court of Appeals then affirmed the action of the trial judge in dismissing the plaintiff's action on the ground that he had failed to establish on the merits of his case that his discharge was wrongful. Such a decision is wholly consistent with the decision sought here to be reviewed.

In the *Walters* case the plaintiff sought a decree reinstating her to her former position with seniority, pension, vacation and pass rights unimpaired and for $6,000 damages. The Court of Appeals determined that the District Court had no jurisdiction of that controversy. It cited and discussed the *Moore*, *Slocum*, *Pitney* and *Koppl* cases. The result which it reached was correct under the holding of the *Moore* case. Its reasoning was identical to that of the court whose judgment is sought to be reviewed.

Switchman's Union v. *Ogden Union Railway and Depot Co.*, 209 F. 2d 419 (C. A. 10, 1954), is a case very similar to the *Walters* case. It was a suit for injunctive relief by a union and three employees of the defendant railroad which involved compulsory reinstatement of three employees to their employment and a controversy between two unions as to whether the employees should or should not be reinstated. The court rightly decided that the controversy was one over which the National Railroad Adjustment Board had jurisdiction. It is not in conflict with the decision or reasoning of the court below but deals with one

type of remedy which a former employee has under the doctrine of the *Moore* case while the case at bar deals with the other.

There is no merit in any of the contentions of the petitioner and its petition for a writ of certiorari should be denied.

Respectfully submitted,

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